

STATE OF CALIFORNIA

Arnold Schwarzenegger, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
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August 24, 2006

Ruben Grijalva
Department of Forestry and Fire Protection
PO Box 944246
Sacramento, CA 94244-2460

Re: Public Works Case No. 2006-010
Proposition 40 Watershed and Fuels Community Assistance Grants
Program
Department of Forestry and Fire Protection

Dear Mr. Grijalva:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to California Code of Regulations, title 8, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that fuels reduction projects performed under the Proposition 40 Watershed and Fuels Community Assistance Grants Program are not public works and therefore are not subject to the payment of prevailing wages.

Factual Summary

Over the last two years, the California Department of Forestry and Fire Protection ("CDF") has been in the process of implementing a Watershed and Fuels Community Assistance Grants Program ("Program"). The goal of the Program is to protect watershed resources, water quality, life and property, by minimizing fire risk in 15 specified vulnerable counties in the Sierra Nevada mountains. Grant applications for individual fuels reduction projects are approved by CDF and funded with proceeds from the sale of state general obligation bonds pursuant to Proposition 40 (the California Clean Water, Clean Air, Safe Neighborhood Parks, and Coastal Protection Act of 2002).

To date, CDF has approved 72 grant applications for individual fuels reduction projects to be funded under the Program. Thirty-six projects were performed during 2004-2005, and thirty-six more are being performed during 2005-2006. All of the projects break down into one of the following three categories:

[1] Residential Chipping projects. Residents cut unwanted brush and branches on their property and stack the brush and branches at the

edge of a roadway near their home. The grantee contracts with a contractor or vendor to bring a chipper to the property to convert the brush and branches into wood chips. The chips are then broadcast through the back end of the chipper into the surrounding forest area or left in piles for the residents to dispose of or use themselves, or are hauled away at the request of the grantee for later use.

[2] **Rural Road Fuel Break projects.** These projects are performed along roadways and occasionally alongside structures in rural areas. All brush is removed within approximately 150 feet from both sides of the roadway (or structure). Most trees less than six inches in diameter are cut down and left at stump height (one to two feet). Most trees over six inches in diameter are pruned from the ground level up to 16 feet above the ground. Wood waste is then either piled, dried and burned, or chipped using a masticator and then spread as mulch on the forest floor for erosion control. In a few cases, herbicide is applied to stumps to prevent regrowth.

[3] **Fire Break projects.** These projects are typically performed in completely wooded remote settings. Most, but not all, vegetation is removed in an area approximately 300 feet wide and up to several miles long. All brush and shrubbery and some trees are removed, leaving behind small grasses and the "crowns" or tops of tall trees. Wood waste is then either piled, dried and burned, or chipped using a masticator and then spread as mulch on the forest floor for erosion control. In a few cases, herbicide is applied to stumps to prevent regrowth.

CDF expects that these projects will be effective in reducing the fuel load in the affected counties for approximately five years before natural regrowth is expected.

Analysis

A "public work" is defined by Labor Code section 1720(a)(1)¹ as: "Construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds ..."

All of the projects here will be paid for with public funds in the form of grants from CDF, which are funded with proceeds from the sale of state general obligation bonds. All of the projects will be

¹All statutory references herein are to the Labor Code, unless otherwise specified.

performed under contract with the grantee.² The only question presented is whether any of the projects constitute "alteration" within the meaning of section 1720(a)(1).

"To 'alter' is merely to modify without changing into something else," and that term applies "to a changed condition of the surface or the below-surface." *Priest v. Housing Authority* (1969), 275 Cal.App.2d 751, 756. "Alter" as defined by Webster's Third New International Dictionary (2002) at page 63 is "to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else." Thus, with regard to land, under these definitions to alter under section 1720(a)(1) is to modify a particular characteristic of the land.

The work involved in the Residential Chipping projects is not alteration under section 1720(a)(1). To prepare for these projects, residents gather branches from their yards and stack them at the side of the road. Contractors then chip the wood. The chips are either left in piles for the residents to use, are spread in the forest for erosion control or are hauled away at the request of the grantee. The chipping and disposal of the wood does not modify a particular characteristic of the land. The land will still be a residential parcel, just cleared of wood debris in order to eliminate a potential fire hazard near and around residential structures.

The work involved in Rural Road Fuel Break projects is not alteration under section 1720(a)(1). A narrow portion of a wooded parcel, alongside an existing road or structure, is being thinned and pruned. Wood waste is either piled, dried and burned, or chipped and spread on the ground as mulch for erosion control. Regrowth is expected in approximately five years. This work, the thinning, pruning and disposal of vegetation to create safe escape

²Some of the grant applications mention the possibility of certain aspects of the projects being performed by force account, volunteers or inmate labor. Because of the conclusion reached herein that none of the fuels reductions projects performed under the Program is a public work within the meaning of section 1720(a)(1), we need not address the issue raised by the possibility that some of the work might be performed other than under contract. Please note, however, that work carried out by a public agency with its own forces is exempt from prevailing wage obligations under section 1771. And, work performed by volunteers or members of the California Conservation Corps or Community Conservation Corps may not be public work under conditions set out in section 1720.4. There is no Labor Code section addressing entitlement to prevailing wages for inmate labor and therefore any questions concerning the applicability of California's prevailing wage laws to inmate labor would need to be addressed on a case-by-case basis.

routes in case of major fires and to prevent the spread of fire, does not modify a particular characteristic of the land. The land will still be wooded and will not be noticeably different from before.³

Finally, the work involved in Fire Break projects is not alteration under section 1720(a)(1). Like the Rural Road Fuel Break projects, these projects affect a narrow (300 feet wide) strip of land on a wooded parcel. Trees within the strip are thinned and pruned in an effort to prevent the spread of fire. Grasses and tree crowns remain intact. Wood waste is either piled, dried and burned, or chipped and spread on the ground as mulch for erosion control. Regrowth is expected in approximately five years. Also like the Rural Road Fuel Break projects, the work involved in these projects does not modify any particular characteristic of the land. Areas outside of the strip will remain forested and in their natural state, just less vulnerable to the spread of forest fires.

The analysis and result reached herein is consistent with the FW 2005-026, *Tree Removal Project, County of San Bernardino Fire Department* (November 18, 2005). In that precedential public works coverage decision, the Acting Director found that the removal of dead, diseased and dying pine trees in the San Bernardino mountains was not alteration within the meaning of section 1720(a)(1) because no particular characteristic of the land was being modified. In *Tree Removal Project*, the land will still be a forest or wooded area, just healthier than it was before. Here, the land will still be a forest or wooded area, just more fire-resistant than it was before.

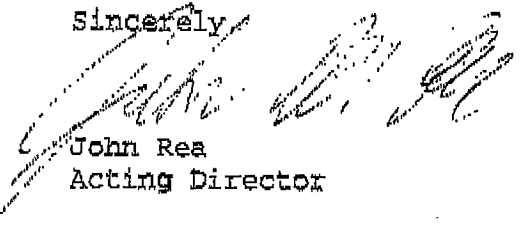
For the foregoing reasons, under the specific facts of this case, the 72 fuels reduction projects performed under the Program are not public works and therefore do not require the payment of prevailing wages.

³This is consistent with the analysis in FW 2005-009, *The Hauling of Biosolids From Orange County* (April 21, 2006), which found that the application of fertilizer sludge to farmland by injection and disking was not alteration because there was no modification to the land. The Acting Director noted that after the fertilization, the land remained farmland, not noticeably different from before.

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I hope this determination letter satisfactorily answers your inquiry.

Sincerely,



John Rea
Acting Director